88-1196

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

CASE NO. _____

October 1987 Term

STATE OF FLORIDA,

Petitioner,

v.

WILLIE POTTS, Jr.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

DOES A STATE STATUTORY SCHEME PROVIDING ENHANCED PENALTIES FOR INDICTEES WHO CARRY CONCEALED FIREARMS DENY SUCH INDICTEES THEIR FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

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13 F.L.W. 78 (Fla. 4th DCA December 30, 1987), affirmed sub.nom. State v. Potts, 13 F.L.W. 353 (Fla. June 2, 1988)

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of State v. Potts, 13 F.L.W. 353 (Fla., June 2, 1988), affirming Potts v. State, 13 F.L.W. 79 (Fla. 4th DCA, December 30, 1987), pursuant to 28 U.S.C. §1257(3).[1]

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[1] Please see Appendix I for the text of these decisions.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED[2]

Amendments V and XIV (Section 1),
Constitution of the United States.

Rule 17.1(b), Rules of the
Supreme Court of the United States.

§§790.01(2) and 790.07(2), Fla. Stat.

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[2] Please see Appendix II for the texts of these authorities.

STATEMENT OF THE CASE AND FACTS

For purposes of framing the narrow legal issue presented in its petition for writ of certiorari, petitioner, the State of Florida, adopts the decision under review, State v. Potts, 13 F.L.W. 353 (Fla., June 2, 1988), affirming Potts v. State, 17 Fla. 78 (Fla. 4th DCA December 30, 1987), as its "statement of the case and facts."[3]

For the convenience of the Court, the State would summarize that the decision below held that §790.07(2), Fla. Stat., by providing for enhanced penalties for indictees as opposed to others who carry concealed firearms, see §790.01(2), Fla. Stat., violated respondent Willie Potts, Jr.'s federal consti-

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[3] References to the two volume record on appeal to be transmitted to this Court if certiorari is granted will be designated "(R:)."

tutional right to substantive due process of law as guaranteed by Amendments V and XIV, Constitution of the United States.

REASONS FOR GRANTING THE WRIT

State v. Potts conflicts with United States v. Craven, infra, on the question of whether the federal due process clause permits the imposition of legislatively enhanced punishments against indictees for firearms violations.

ISSUE

DOES A STATE STATUTORY SCHEME PROVIDING ENHANCED PENALTIES FOR INDICTEES WHO CARRY CONCEALED FIREARMS DENY SUCH INDICTEES THEIR FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

DISCUSSION

In State v. Potts, the Florida Supreme Court affirmed the decision of the Florida Fourth District Court of Appeal in Potts v. State, that §790.07(2), by providing for enhanced penalties for indictees as opposed to others who carry concealed firearms, see §790.01(2), violated respondent's federal constitutional right to substantive due process of law. The Florida court found that covertly armed indictees are not necessarily more dangerous than covertly armed nonindictees, and hence that aggravated penalties for indictees bore no rational

relationship to the legitimate state interest of protecting the public safety.

18 U.S.C. §922(n) provides that "it shall be unlawful for any person who is under indictment" to ship or receive firearms beyond state lines. The federal appellate courts have routinely upheld statutes such as this against due process challenges identical to that tendered by respondent below. See, e.g., United States v. Craven, 478 F.2d 1329, 1338-1340 (6th Cir. 1973), cert. denied, 414 U.S. 866 (1973); United States v. Snell, 508 F.2d 21, 23-24 (5th Cir. 1975), cert. denied, 423 U.S. 825 (1975); United States v. Thoresen, 428 F.2d 654, 658-662 (9th Cir. 1970). Consider the following example:

> It was eminently reasonable for Congress to conclude that the indictment of an individual for a crime punishable by

> imprisonment for a term exceeding one year is so often indicative of a propensity for violence that the indictment classification of 18 U.S.C. §922..was justified in the public interest.

United States v. Craven, 478 F.2d 1329, 1339.

Respondent submits that the Florida Supreme Court's decision in State v. Potts conflicts with the Sixth Circuit's decision in United States v. Craven on the federal constitutional question of whether enhanced sanctions may be imposed upon indictees for firearm violations under the due process clause. This conflict vests this Honorable Court with jurisdiction to review State v. Potts. Rule 17.1(b), Rules of the Supreme Court of the United States; see generally, Michigan v. Long, 463 U.S. 1032, 1037-1044 (1983). If the

Court is not disposed to grant plenary review, a summary reversal on grounds that the Florida Supreme Court failed to properly apply the aforediscussed federal precedents, with or without a remand to that court, would certainly be acceptable to the State.

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully submits that this Honorable Court should GRANT its petition for writ of certiorari and REVERSE the Florida Supreme Court's decision in State v. Potts, with directions that the adjudication and sentence entered by the trial judge be REINSTATED.

Respectfully submitted,

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APPENDIX I

Copy of the Decision under
Review, State v. Potts,
13 F.L.W. 353 (Fla. June 2, 1988),
affirming Potts v. State,
13 F.L.W. 78 (Fla. 4th DCA,
December 30, 1987)

IN THE SUPREME COURT OF FLORIDA

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NO. 71,765

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STATE OF FLORIDA,

Appellant,

v.

WILLIE POTTS, JR.,

Appellee.

Robert A. Butterworth, Attorney General, Lee Rosenthal and John W. Tiedemann, Assistant Attorneys General, West Palm Beach, Florida, for appellant.

Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for appellee.

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APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

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(June 2, 1988)

(BARKETT, J.) We have on appeal Potts v. State, No. 4-86-1073 (Fla. 4th DCA 1987), which declared unconstitutional a portion of section 790.07(2), Florida Statutes (1985). Jurisdiction is mandatory. Art. V, §3(b)(1), Fla. Const.

Having reviewed the entire record in this case, we have determined that the district court's decision below is an eminently correct statement of the law. The state through its criminal process may not penalize someone merely for the status of being under indictment or otherwise accused of a crime, as it has attempted to do here. We therefore approve and adopt the district court's opinion in its entirety as our own. Section 790.07(2), Florida Statutes (1985), is facially unconstitutional to the extent it purports to penalize a

person who is under indictment with greater severity than one who is accused of no crime.

It is so ordered. (McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., Concur.)

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT

- - - - - - - - - - - - - - - - - - - -

NO. 4-86-1073

- - - - - - - - - - - - - - - - - - - -

WILLIE POTTS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Richard L. Jorandby, Public Defender, and Charles D. Peters, Assistant Public Defender, West Palm Beach, Florida, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Lee Rosenthal, Assistant Attorney General, West Palm Beach, Florida, for appellee.

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APPEAL FROM THE CIRCUIT COURT FOR
PALM BEACH COUNTY

- - - - - - - - - - - - - - - - - - - -

(December 30, 1987)

(HERSEY, C.J.) Willie Potts, Jr., was convicted of violation of section 790.07(2), Florida Statutes (1985), which provides:

> Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

(Emphasis added.) He asserts, on appeal, the unconstitutionality of that statute on due process grounds.

In considering whether or not a statute violates substantive due process, the basic test is whether the state can justify the infringement of its legislative activity upon personal rights and liberties. State v. Walker, 444 So.2d 1137 (Fla. 2nd DCA), affirmed, 461 So.2d 108 (Fla. 1984). The statute must bear

a reasonable relationship to the legislative objective and must not be arbitrary. Id. If there is a legitimate state interest which the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld. Id.

Here, the state contends that the objective of the disputed statute is to protect the health and safety of the public. The state also contends that it is not unreasonable to presume that persons "under indictment" present a greater risk to society than other citizens; therefore the statute bears a reasonable relationship to the legislative objective.

If an individual is presumed innocent until proven guilty, however, how can it validly be assumed that individ-

uals "under indictment" necessarily present a greater risk to society than other citizens? There are, of course, provisions for deprivation of liberty while pending trial in certain cases. See §907.041, Fla. Stat. (1985); Fla.R. Crim.P. 3.132. But in those instances, unlike here, a defendant has an opportunity to be heard on the matter of his potential threat to society.

Carrying a concealed weapon while not under indictment, prohibited by section 790.01(1), is a first-degree misdemeanor, punishable by a maximum of one year in prison, whereas the instant offense is a second-degree felony, punishable by fifteen years in prison. The instant statute, therefore, in effect criminalizes the activity of "being under indictment" and punishes that of-

fense by up to fourteen years' imprisonment. Is an individual "under indictment" who carries a concealed weapon necessarily more dangerous than an individual NOT "under indictment" who carries a concealed weapon? What if an individual is convicted under the instant statute and is sentenced to fifteen years' imprisonment and then is later found not guilty of the charges for which he was "under indictment"?

Although we agree with the state that there is a legitimate interest in protecting the health and safety of the public, we do not agree that criminalizing the status of being "under indictment" is a reasonably related means to achieve the intended end. Therefore, despite the rule that every presumption is to be indulged in favor of the valid-

ity of a statute when considering its constitutionality, Griffin v. State, 396 So.2d 152 (Fla. 1981), we conclude that the portions of section 790.07 which prohibit certain activities "while under indictment" are unconstitutional as violative of substantive due process.

Below, appellant raised the constitutional issue by way of an ore tenus motion to dismiss. The trial court summarily denied the motion, however, as untimely. The state now contends that the constitutional issue was waived, because grounds other than fundamental grounds for a motion to dismiss are waived if not timely presented. Fla.R. Crim.P. 3.190(c). Application of a facially unconstitutional statute, however, such as occurred here, constitutes fundamental error. See Trushin v.

State, 425 So.2d 1126 (Fla. 1982); Alexander v. State, 450 So.2d 1212 (Fla. 4th DCA 1984), remanded on other grounds, 477 So.2d 557 (Fla. 1985). Accordingly, the issue was not waived and is properly before this court for review.

Finding the statute unconstitutional, we reverse and remand with instructions to discharge the appellant unless he is being held on other charges or is incarcerated for other convictions.

REVERSED AND REMANDED. (DOWNEY and WALDEN, JJ., concur.)

APPENDIX II

Copy of the Constitutional Provisions and Regulations Involved

Amendments V and XIV (Section 1), Constitution of the United States:

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 17.1(b), Rules of the Supreme Court of the United States:

> RULE 17. Considerations governing review on certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered...
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

§790.01(2), Fla. Stat.:

> 790.01. Carrying concealed weapons...
> (2) Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§790.07(2), Fla. Stat.:

> 790.07. Persons engaged in criminal offense, having weapons...
>
> (2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.